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## RAWLS, JUSTICE, AND THE INCOME TAX

*Charles R. O'Kelley, Jr.\**

### I. INTRODUCTION

A heated debate rages in tax policy circles concerning whether the federal personal income tax should be imposed on an accretion base or on a consumption base.<sup>1</sup> An accretion-type income tax would define taxable income as the sum of (i) personal consumption and (ii) net increase in wealth, occurring during the applicable accounting period.<sup>2</sup> A consumption-type income tax would define taxable income as including only personal consumption. Stated simply, a consumption-type income tax would allow a deduction from gross income for the net addition to savings during the appli-

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<sup>1</sup> The classic discussion is N. KALDOR, *AN EXPENDITURE TAX* (1955). For the recent debate, see Andrews, *A Consumption-Type or Cash Flow Personal Income Tax*, 87 HARV. L. REV. 1113 (1974); Warren, *Fairness and a Consumption-Type or Cash Flow Personal Income Tax*, 88 HARV. L. REV. 931 (1975); Andrews, *Fairness and the Personal Income Tax: A Reply to Professor Warren*, 88 HARV. L. REV. 947 (1975); THE BROOKINGS INSTITUTION, *WHAT SHOULD BE TAXED: INCOME OR EXPENDITURE?* (J. Pechman ed. 1980); R. GOODE, *THE INDIVIDUAL INCOME TAX* 11-57 (1976); U.S. DEP'T OF TREASURY, *BLUEPRINTS FOR BASIC TAX REFORM* 9-51 (1977) [hereinafter cited as *BLUEPRINTS*]; Kahn, *The Place of Consumption and Net-Worth Taxation in the Federal Tax Structure*, in *BROAD-BASED TAXES* 133 (R. Musgrave ed. 1973); Klein, *Timing in Personal Taxation*, 6 J. LEGAL STUD. 461 (1977); Warren, *Would a Consumption Tax Be Fairer Than an Income Tax?*, 89 YALE L.J. 1081 (1980).

<sup>2</sup> H. SIMONS, *PERSONAL INCOME TAXATION* 50 (1938), contains the oft-cited definition of income as total accretion: "Personal income may be defined as the algebraic sum of (1) the market value of rights exercised in consumption and (2) the change in the value of the store of property rights between the beginning and the end of the period in question."

cable accounting period, but an accretion-type income tax would not. Thus, if in year one an individual earns \$200 and spends \$100, his or her taxable income would be \$200 under an accretion-type income tax and \$100 under a consumption-type income tax.<sup>3</sup>

The importance of the debate is better illustrated by comparing individuals having the same level of consumption, but different amounts of pre-tax income. Consider individual *A* who in year one earns and spends \$20,000 and individual *B* who in year one earns \$1,000,000, but only spends \$20,000. Under a pure accretion-type income tax, *A* and *B* would each have taxable income equal to their pre-tax receipts. However, in a pure consumption-type income tax *A* and *B* would each have a taxable income of \$20,000. Thus, for individuals with different money incomes but the same total annual expenditures for personal consumption, the choice between an accretion-based and a consumption-based income tax will greatly affect their relative tax burdens. *A* will have a slightly greater tax burden under a consumption-type income tax than under an accretion-type income tax, while *B* will have a significantly lower income tax bill under a consumption-type income tax than under an accretion-type income tax.<sup>4</sup>

As in most policy debates, discussants compare the competing models to determine which is the more equitable, efficient, and practicable.<sup>5</sup> However, the answer suggested by an *ad hoc* weighing of these factors will not necessarily be a just answer, and it would be agreed by all of us that we are constrained to seek a just an-

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<sup>3</sup> The major difficulties in implementing an accretion-type income tax are the proper treatment of unrealized changes in net worth, the proper calculation of capital consumption allowances, and the proper treatment of imputed income from such items as leisure and services performed in the home by housewives. These problems will be ignored in this article. For simplicity an accretion-type income tax should be thought of as one in which taxable income equals the gross amount received from wages and investment return. A consumption-type income tax is one in which taxable income equals gross realized wages and investment return less net savings or plus net dissavings.

<sup>4</sup> The assumptions being made are these: (1) total revenue needs remain constant; (2) total personal income remains constant; (3) personal saving increases under a consumption-type income tax. Increased saving will result in a lower total (national) taxable income and thus a need for higher rates of tax. Those having income levels or consumption patterns which preclude saving will thus pay more taxes under a consumption-type tax, while high income individuals with low present consumption levels will pay dramatically lower tax bills.

<sup>5</sup> See, e.g., Bradford, *The Case for a Personal Consumption Tax*, in *THE BROOKINGS INSTITUTION, WHAT SHOULD BE TAXED: INCOME OR EXPENDITURE?* 75-125 (J. Pechman ed. 1980).

swer.<sup>6</sup> Accordingly, the first task in any policy debate must be to determine the limits placed on our debate by the requirements of justice. Only then will we know the range of possible just solutions from which we may choose. Indeed, we may discover that as to a particular question there is no range of possible just solutions. Instead there is one required solution.

Questions about the appropriate rules and mechanisms of taxation are to begin with, then, questions about social justice. A society is socially just if it justly divides and distributes the advantages obtained from social cooperation and justly determines and distributes the basic individual rights and duties collectively constituting the terms and conditions of social cooperation. The actual distributive shares of rights, advantages, and duties in any society are determined by its major social institutions, including its system of taxation.<sup>7</sup> Because a just distribution is dependent upon a just distributive mechanism, social justice exists only if the major social institutions are justly designed.<sup>8</sup>

In a society which employs an income tax, distributive shares of income are determined by subtracting from gross income the amount of tax paid. An income tax is thus a part of society's distributive mechanism and must be designed in accordance with the governing principles of social justice.

In a society where the distributive shares of before-tax income would be just if left undisturbed, an income tax must be designed so that the after-tax distribution of income is also just. In such a society an income tax is merely one of many possible revenue raising mechanisms. It serves no just purpose, but rather is constrained by requirements of justice. In such a society, the debate would center on which income tax base should be used in order to maintain the justness of the initial distribution of income. Argument would focus on how much income tax should be paid by peo-

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<sup>6</sup> This point is even acknowledged by one of the leading proponents of economic analysis. Calabresi, *About Law and Economics: A Letter to Ronald Dworkin*, 8 HOFSTRA L. REV. 553, 559 (1980): "[E]quating an appropriate efficiency-distribution mix with justice requires assumptions that are neither intuitively obvious nor so widely accepted as to permit me to say, 'Solve the problem of that mix and you have justice.'" The point is straightforwardly made in J. RAWLS, *A THEORY OF JUSTICE* 3 (1971): "[L]aws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust."

<sup>7</sup> 1 J. MILL, *PRINCIPLES OF POLITICAL ECONOMY* 258, 259 (5th London ed. 1883).

<sup>8</sup> J. RAWLS, *supra* note 6, at 5.

ple with differing amounts of justly held income.

Many of us would insist, however, that the pre-tax distribution of income in our society is unjust. If this is so, then an income tax is not merely one of several possible revenue raising devices. Instead it is an essential part of the distributive mechanism of society. Its purpose must be to extract from each taxpayer the portion of gross income that would make his or her distributive share unjust if not extracted.

If the purpose of an income tax is to correct an unjust initial distribution of income, then justice requires the use of an accretion-type income tax. The unjust distribution of income is clearly reflected by the relative amounts of pre-tax income<sup>9</sup> and would be clouded or totally masked by a consumption-type income tax.

Consider again individual *A* who in year one earns and spends \$20,000 and individual *B* who in year one earns \$1,000,000, but spends only \$20,000. Under a consumption-type income tax *A* and *B* would each have taxable incomes of \$20,000, which taxable incomes would not reflect the relative unjustness of *B*'s pre-tax income.<sup>10</sup> Therefore, a consumption-type income tax would be unable to correct an initially unjust distribution of income.<sup>11</sup>

If the pre-tax distribution of income is just, then debate may proceed as to which definition of income is preferable. However, if society's initial distribution of pre-tax income is unjust, we must necessarily define income as net accretion to wealth, whether consumed or saved. Accordingly, the first issue for those debating the appropriate definition of income must be a determination of whether the present distribution of pre-tax income is just. The answer depends on whether or not the present distribution of pre-tax income satisfies the governing principles of social justice.

The first issue resolves, therefore, into a question of social justice. It is generally felt, however, that questions of justice cannot be meaningfully debated. Ultimately one's conception of justice is

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\* Doubt has been expressed concerning the correlation between gross income and undeserved income. W. BLUM & H. KALVEN, *THE UNEASY CASE FOR PROGRESSIVE TAXATION* 81 (1963). For simplicity of illustration I ignore the problem in my textual discussion and do not address the issue in this article. Certainly a major design problem for an ideal accretion-based income tax would be insuring that there is a chain-connection between taxable income and undeserved income.

<sup>10</sup> There is no implication intended that *A* is entitled to his income.

<sup>11</sup> See text accompanying notes 26, 31, & 73-74 *infra*.

a matter of personal preference and to argue about such matters "is to reduce the discussion frankly to the level of ethics or aesthetics."<sup>12</sup> Professor Andrews makes the point clearly in his influential article in favor of a consumption base:

Matters of fairness are not generally subject to logical demonstration from independent premises. All that reason can do is to elaborate the implications of plausible hypotheses in order to facilitate an informed choice among them. What we need to do, therefore, is to examine the matter from both the equal-earner and equal-consumer perspectives, recognizing that each incorporates a certain assumption about how taxes are to be distributed, and to reserve final judgment and choice between these assumptions until after the implications of both have been explored.<sup>13</sup>

Professor Andrews is correct to suggest that we cannot hope to obtain unanimous agreement as to the requirements of justice. However, he is engaged in a dangerous sleight of hand when he suggests that as long as we recognize our underlying assumptions we need not attempt to debate them. Instead, he suggests, we should first consider which definition of income will be more practicable and efficient. Only if we are dissatisfied with the result of this inquiry need we worry about matters of justice.

The danger of this approach is that it is calculated to avoid a consideration of the justness of the underlying structure of society. The focus of discussion is then on the inner workings of the existing system—admittedly the place lawyers feel most comfortable. Focusing on the inner workings serves to reinforce the legitimacy of the existing system and to further insulate it from criticism.<sup>14</sup>

<sup>12</sup> H. SIMONS, *supra* note 2, at 18.

<sup>13</sup> Andrews, *Fairness and the Personal Income Tax: A Reply to Professor Warren*, 88 HARV. L. REV. 947, 950 (1975).

<sup>14</sup> See H. MARCUSE, *ONE DIMENSIONAL MAN* 172-73 (1964). Marcuse describes the result of focusing only on the inner workings:

Philosophic thought turns into affirmative thought; the philosophic critique criticizes within the societal framework and stigmatizes non-positive notions as mere speculation, dreams or fantasies.

. . . .

. . . The contemporary effort to reduce the scope and the truth of philosophy is tremendous, and the philosophers themselves proclaim the modesty and inefficacy of philosophy. It leaves the established reality untouched; it abhors transgression.

Almost unconsciously, we are lulled into assuming that the basic structure of society is just and that the pre-tax distribution of income is just. Andrews himself has clearly fallen victim to this syndrome when he states that "[t]he nondiscrimination which is most important as a matter of fairness is equal treatment of equal consumers."<sup>15</sup> As a matter of social justice the goal should instead be stated to be equal treatment of equal consumers *who are justly entitled to what they spend*. The Andrews formulation overlooks the fundamental question of the justness of the pre-tax distribution of income. Dealing in common sense maxims and focusing only on the internal working of the income tax thus not only avoids the main issue—the requirements of justice—but also serves to hide the issue from view. I believe, and intend to illustrate, that we can meaningfully discuss competing models of the income tax only if we elaborate and discuss our underlying assumptions about justice.

To the extent the primacy of justice is acknowledged in tax policy debate, such acknowledgment is coupled with the assertion that, of course, questions of justice cannot be meaningfully debated.<sup>16</sup> The discussants then attempt to resolve the issue in question by use of *ad hoc* arguments of fairness and efficiency. The major purpose of this article is to show that not only is justice the primary issue, but that questions of justice can be meaningfully addressed. First, I will examine some of the *ad hoc* arguments of fairness and efficiency which have been made by proponents of a consumption base and will point out the unpersuasiveness of such arguments when the primacy question of justice has not been addressed. Next, I will show that while true utilitarians would acknowledge the primacy of justice, utilitarianism is no more persuasive than *ad hoc* maxims with respect to questions of justice. Next, I will explain how the relative merits of competing principles of social justice can be meaningfully debated by non-philosophers within the framework for comparative philosophical analysis developed by John Rawls. I will then examine the principles of social justice described by John Rawls and explain both the purpose that

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*Id.* at 172, 173.

<sup>15</sup> Andrews, *supra* note 13, at 949.

<sup>16</sup> See Andrews, *supra* note 13, at 950; Warren, *Would a Consumption Tax Be Fairer Than an Income Tax?*, 89 YALE L.J. 1081, 1082 (1980).

an income tax plays in a society structured in accordance with these principles and the definition of income that should be adopted by a society so structured. I will then consider the purpose of the income tax and the indicated definition of income under a libertarian theory of justice. Finally, I will illustrate the use of the Rawlsian framework for comparative philosophical analysis by examining how libertarian principles of justice might be derived and justified.

The scope of this article is thus limited in several respects. I do not attempt to investigate the various design problems inherent in an accretion-type income tax, though I intend to demonstrate at a later date that such design problems can be solved once the role of the income tax is clearly defined.<sup>17</sup> Nor is there any attempt to deal with collectivist objections to the Rawlsian framework, though I believe such objections can and should be met.<sup>18</sup> Instead I limit my task to making a *prima facie* case for the possibility of meaningfully discussing questions of justice in connection with tax policy debate.<sup>19</sup>

## II. THE PROBLEM WITH *Ad Hoc* ARGUMENTS AND UTILITARIANISM

### A. *Discrimination Against Future Consumption*

A frequently advanced argument against an accretion base is that it discriminates against those with a relatively greater preference for future consumption.<sup>20</sup> Economists would argue that not only is this a case of fairness, but that the accretion base violates the principle of efficiency in that it causes consumers to change their preference for present and future consumption, in favor of present consumption.<sup>21</sup> An efficient tax would leave such choice

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<sup>17</sup> In addition to the design problems described in note 3, *supra*, major problems are determining the proper taxable unit, which personal deductions are consistent with the accretion ideal, and what adjustments, if any, are required because of inflation.

<sup>18</sup> For an introduction to these objections, see Fisk, *History and Reason in Rawls' Moral Theory*, in *READING RAWLS* 53 (N. Daniels ed. 1974); Miller, *Rawls and Marxism*, *id.* at 206.

<sup>19</sup> Of course, if meaningful debate is possible its utility is not limited to the tax area. I emphasize tax policy because (with all due respect to Professor Kronman's pitch for contract law—Kronman, *Contract Law and Distributive Justice*, 89 *YALE L.J.* 472, 498-510 (1980)) any real gains in distributional equity in our society will occur through the mechanism of taxation.

<sup>20</sup> Andrews, *A Consumption-Type or Cash Flow Personal Income Tax*, 87 *HARV. L. REV.* 1167, 1167-69 (1974).

<sup>21</sup> R. MUSGRAVE, *THE THEORY OF PUBLIC FINANCE* 260-63 (1959). See also Rosen, *Is It*



unaffected. To understand these points, consider an example similar to the one used by Professors Andrews and Warren in their dialogue concerning the fairness of a consumption-based income tax.<sup>22</sup> Worker A earns \$200 in year one, of which \$100 is spent to support A's chosen standard of living. A has no investment income for the year. In a world without taxes, A could save \$100. If invested at 9% interest, compounded semiannually, his savings would in twenty-four years grow to \$800.<sup>23</sup> If instead A is subject to a consumption-type income tax of 33%, he will pay \$33 in tax, leaving \$67 to be saved. If invested at 9% interest, compounded semiannually, this amount would in twenty-four years grow to \$533. The relative value of present consumption in comparison to future consumption is one to eight in both a non-tax world and a world with a consumption-type income tax. Thus a consumption-type income tax does not discriminate against those with a relatively greater preference for present or future consumption.

The imposition of an accretion-type tax does affect the relative preference for present or future consumption. A 33% tax imposed on A's gross income without allowance of a deduction for savings, results in a tax of \$67, reducing the amount available for investment to \$33. Moreover the annual return on such investment will be subject to tax. Thus \$33 invested at 9% interest, compounded semiannually will produce an after-tax accumulation of \$133 after twenty-four years—the same accumulation that would have resulted under a consumption-type tax if the investment yield were 6% compounded semiannually. Under the accretion-type income tax the ratio of funds available to Worker A for current consumption in year one to the amount available in year twenty-four is only one to four. Thus, unlike a consumption-type income tax, the accretion-type tax discriminates against those with a relatively greater preference for future consumption.<sup>24</sup>

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*Time to Abandon Joint Filing?*, 30 NAT'L TAX J. 423, 426-27 (1977).

<sup>22</sup> See Andrews, *supra* note 20; Warren, *Fairness and A Consumption-Type or Cash Flow Personal Income Tax*, 88 HARV. L. REV. 931, 934-37 (1975).

<sup>23</sup> See Andrews, *supra* note 20, at 1125 n.20: "There is a convenient rule of thumb that says money invested at  $x$  percent per annum compound interest will double in  $72/x$  years . . . . Therefore, at 9% money will double three times in 24 years."

<sup>24</sup> It should be noted that while the argument lends colorable support to the exemption from taxable income of investment return, it lends no support at all to the exemption from taxable income of amounts saved out of wages earned during the taxable year. Look again at Worker A who in year one earns \$200 and spends \$100. If A is subject to a 33% rate of tax

The logic of this argument is unassailable and seductive in its appeal. As with all logical arguments, however, it is only as sound as its premises. Absent is any explanation of why justice requires a tax to be designed so as to leave consumers with the same relative ability to consume in the future as they would have in a non-tax world. This failure has three facets.

First, the amount of future consumption to which an individual will be entitled is dependent upon the rate of investment return.<sup>25</sup> However, the argument ignores the question of whether the pre-tax distribution of investment return in our society is just. If this cannot be demonstrated then justice requires that investment return be included in taxable income in order that taxable income will reflect the relative unjustness of pre-tax income.<sup>26</sup>

There is a second flaw in the argument. Presumably the non-tax world to which comparison is being made is a world with an existing regime of property rights.<sup>27</sup> To establish that such is a proper world with which to make comparison requires a showing that the distribution of pre-tax income in such a non-tax world would be just. Such a determination necessarily requires a consideration of the justice of the preexisting scheme of property rights because such preexisting regime will in large measure determine the distribution of income.<sup>28</sup> If the non-tax world and the pre-tax

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under an accretion-type income tax but to no tax on investment return, then A will be able to invest \$33 in year one. If invested at 9% interest compounded semiannually such investment would grow to \$267 after twenty-four years. If instead A is subject to a 33% rate of tax under a consumption-type income tax, then A will be able to invest \$67 in year one. Invested in the same manner described two sentences above, the amount accumulated after twenty-four years would total \$533. However, in either case the ratio of money available for consumption in year one to money available in year twenty-four would be one to eight. Thus, if investment return is exempted, an accretion-type income tax does not discriminate against those with a relatively greater preference for present or future consumption.

<sup>25</sup> For a related discussion, see Warren, *supra* note 16, at 1097-1101.

<sup>26</sup> See pp. 3-4 *supra*.

<sup>27</sup> I make this assumption because in a state of nature, with no regime of property rights in place, one's right to present or future consumption would not be dependent on law but on force. Thus comparison to a state of nature would be meaningless.

<sup>28</sup> Duncan Kennedy makes the same point with respect to judicial lawmaking in Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1763 (1976):

But free bargaining presupposes an existing definition and distribution of property rights. . . . It follows that the elimination of the effects of transaction costs on the allocation of resources cannot provide an independent objective criterion for judicial lawmaking. It is only possible to decide that these effects are bad if we can establish that the outcome under some initial regime of legal rules, without transaction costs,

distribution of income therein are unjust, then this hypothetical non-tax world is irrelevant and comparison to it is without value.

The final flaw in this argument is seductive indeed. The governing maxim is stated to be that a tax should not discriminate against those with a relatively greater preference for future consumption. However, the illustrative example deals not with one who merely has a relatively greater preference for future consumption, but with one who has a relatively greater preference for trying to exchange a certain amount of present consumption for a greater amount of future consumption. Further, the example posits that the investment will be successful. To illustrate this point, consider a hypothetical world in which there is no inflation and in which private investment can be made, but always with a risk of loss. In such a world one who merely wished to defer consumption—that is, one who did not wish to forego current consumption in the hope that the unspent money can be parleyed into a larger sum—would put his money in a sock or a safe deposit box. Thus, if Worker A elects to save \$100 in year one, he will still have \$100 in year twenty-four. An accretion base would have no effect on A's preference for present or future consumption because there would be no earnings produced by A's mere deferral of consumption.

### *B. Punishment of Consumption*

One argument for a consumption-based income tax is that the purpose of the income tax is to punish selfish behavior.<sup>29</sup> Accordingly, as Hobbes suggested, only consumption should be taxed.

For what reason is there, that he which laboureth much, and sparing the fruits of his labour, consumeth little, should be more charged, than he that living idly, getteth little, and spendeth all he gets; seeing the one hath no more protection from the commonwealth, than the other?<sup>30</sup>

There are obvious objections to this argument. First, why is it more selfish to spend than to save? Suppose individual A earns and spends \$25,000, while individual B earns \$1,000,000 but only

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would be good.

<sup>29</sup> Dyer, *The Relative Fairness of the Consumption and Accretion Tax Bases*, 1978 UTAH L. REV. 457, 459.

<sup>30</sup> T. HOBBS, *LEVIATHAN* 255 (M. Oakeshott ed. 1962).

spends \$20,000. Is it self-evident that *A* is more selfish than *B* who is hoarding vast amounts of money, the spending of which might stimulate the economy?

A second problem is the relationship of a condemnation of selfishness to a theory of social justice. The argument ignores, and presumably presupposes, the justness of the pre-tax distribution of income. Accordingly, a theory that selfishness in the form of consumption should be the subject of a punitive tax is clearly a subordinate principle of fairness. If the pre-tax distribution of income is unjust, then an accretion-based income tax would be levied. Only if the pre-tax distribution of income is just can we consider designing the income tax in accordance with such a subordinate principle.<sup>31</sup>

A variation of the selfishness argument suggests that the purpose of an income tax is to curtail private consumption so that resources can be consumed instead by the government. If the purpose of the income tax is to curtail consumption, then the proper base for the income tax is personal consumption. However, the second proposition does not follow from the first. The effect of *any* tax is to curtail private consumption.<sup>32</sup> Moreover, to assert that the purpose of income tax is *merely* to curtail private consumption presupposes that the pre-tax distribution of income is just.

### C. *Ability to Pay*

The most frequently cited maxim of tax fairness is that tax burdens should be apportioned according to a taxpayer's relative ability to pay. Consider individual *A* who earns and spends \$20,000 in year one and individual *B* who earns \$100,000 but only spends \$20,000. It appears obvious that *B* has a greater ability to pay tax than *A* and that such greater ability will be reflected by an accre-

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<sup>31</sup> See pp. 3-4 *supra*.

<sup>32</sup> See Andrews, *supra* note 20, at 1165-66:

The primary, intended, real effect of any general revenue-raising tax is to curtail some part of the private consumption of economic resources that would otherwise occur, in order to free those resources for public use, including redistribution to the poor. If the purpose is to curtail consumption, then it is presumptively fair and efficient to distribute the burden of the tax proportionately or progressively in relation to levels of consumption prior to imposition of the tax.

However, Andrews confuses effect and purpose. For an interesting discussion, see Kelman, *Personal Deductions Revisited: Why They Fit Poorly in an "Ideal" Income Tax and Why They Fit Worse in a Far From Ideal World*, 31 STAN. L. REV. 831, 851-56 (1979).

tion-type income tax but not by a consumption-type income tax.

Suppose, however, that we change the facts as follows. In year one A earns \$20,000, representing the investment return on inherited property having at the beginning of the year a fair market value of \$1,000,000. A spends the \$20,000 and invades his inherited estate to spend an additional \$100,000. While A has chosen not to work during year one, he possesses a scarce talent—the ability to perform neurosurgery—which gives him the ability to earn at least \$200,000 a year if he so chooses. Individual B, however, has no prior savings or inheritance to draw upon and has no greater earning power than that reflected in his \$100,000 earnings in year one. Given these facts it is clear that A has a much greater ability to pay than B, yet an accretion base would impose a greater tax on B. Proponents of a consumption-type income tax would quickly point out that under a consumption-type tax A would pay more income tax than B. In the long-run, then it is argued that a consumption-type income tax is a better measure of ability to pay.<sup>33</sup>

There are again obvious problems. In our second example, is A entitled to the sum he inherited? If not, then the second example argues not for a consumption tax but for a wealth tax.<sup>34</sup> The more obvious defect, whether one favors an accretion or consumption base, is an explanation of why relative ability to pay is an appropriate standard to apply. Let us now examine utilitarianism to see if a persuasive supporting moral framework does exist.

#### D. Utilitarianism

Utilitarianism is currently the dominant theory of political morality—a theory which is attacked by both Dworkin and Rawls.<sup>35</sup> Utilitarianism has its roots in the work of Jeremy Bentham who believed that man was governed by “two sovereign masters, *pain* and *pleasure*.”<sup>36</sup> All men seek to maximize their pleasure and minimize their pain. Therefore, any private or governmental action, any law, and any political structure is to be judged “according to the tendency which it appears to have to augment or diminish the

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<sup>33</sup> See BLUEPRINTS, *supra* note 1, at 39-40.

<sup>34</sup> For a discussion of the interrelationship between taxes on consumption, accretion, and wealth, see Warren, *supra* note 16, at 1121-24.

<sup>35</sup> R. DWORKIN, *TAKING RIGHTS SERIOUSLY* ix-xi, 233, 238 (1977); J. RAWLS, *supra* note 6, at 26-27, 187-88.

<sup>36</sup> BENTHAM'S POLITICAL THOUGHT 66 (B. Parekh ed. 1973).

happiness of the party whose interest is in question."<sup>37</sup> The end of a just government is "the greatest happiness of the greatest number."<sup>38</sup>

In present society there is an inherent conflict between individuals. Some individuals must gain at the expense of others. Who gains and who loses will depend on a society's mechanism for distributing rights and duties. If one interprets the principle of utility as requiring maximization of average utility,<sup>39</sup> then a distributive mechanism is just if it maximizes average happiness.

The difficulty with utilitarianism lies in measuring utility. Is not happiness subjective rather than objective, and thus incapable of measurement? Following Bentham, economic utilitarians reason that money is a satisfactory measure of utility. The more money one has the more happiness one can obtain. Even if something cannot be directly obtained with money, one's supply of money is a fair measure of his access to, and enjoyment of, such nonpurchasable items.<sup>40</sup> The equation of money with happiness seems doubtful. Nonetheless, there is a much greater problem with the utilitarian analysis. Let us, therefore, continue tracing the argument so that the larger flaw can be pointed out.

If the money one has determines the amount of his happiness, the principle of utility requires that the system of taxation used by society be designed so as to extract an equal sacrifice of each taxpayer.<sup>41</sup> What constitutes an equal sacrifice is dependent on the ability to pay of each taxpayer.

There are two glaring problems with the utilitarian argument. One flaw is the absence of any explanation of why the greatest happiness of the greatest number should be the governing principle of social justice. We are given no more than a bald assertion that this principle is self-evidently correct.<sup>42</sup> A second flaw is the

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<sup>37</sup> *Id.* at 67.

<sup>38</sup> *Id.* at 195.

<sup>39</sup> Classical utilitarianism required maximization of total happiness. If population remains constant there is no conflict between the principle of average utility and the principle of maximum total utility.

<sup>40</sup> See BENTHAM'S POLITICAL THOUGHT, *supra* note 36, at 119-24. Bentham asserted that money was the best measure of utility—a proposition generally followed by present-day utilitarians.

<sup>41</sup> See W. BLUM & H. KALVEN, *supra* note 9, at 41-44; R. MUSGRAVE, *supra* note 21, at 77, 112; H. SIMONS, *supra* note 2, at 6-12; BLUEPRINTS, *supra* note 1, at 36-41.

<sup>42</sup> On the need to establish the truth or validity of utilitarianism see BRANDT, SOME MER-

unstated underlying assumption that the pre-tax distribution of income is just.

John Stuart Mill is cited as the father of the equal sacrifice doctrine. While his statement of the doctrine,<sup>43</sup> coupled with his defense of an exemption from tax of amounts saved,<sup>44</sup> does seem to ignore or presuppose the justness of the pre-tax distribution of income, such would be an unfair reading of Mill. Rather, Mill advocated equal sacrifice as the basis for taxation only after the conditions of society had been corrected so that the pre-tax distribution of income would be just.<sup>45</sup>

Utilitarians are thus consciously or unconsciously engaged in utopian analysis when they ignore the issue of the justness of pre-tax income. Properly, a utilitarian must first assess the existing distribution of pre-tax income and the existing scheme of rights and duties to determine if they satisfy the principle of utility. If the existing distribution of income, rights, and duties is found to be just, *then* equal sacrifice analysis would be appropriate. Otherwise a utilitarian must require an accretion-based income tax in order to achieve an after-tax distribution of income which maximizes utility and is, therefore, just.

In the final analysis, then, arguments based on alleged discrimination against those with a relatively greater preference for future consumption, along with other *ad hoc* arguments of tax fairness, such as taxation according to relative ability to pay or according to relative consumption, are no more than arguments about horizontal equity—about how to treat two taxpayers who are in similar circumstances in a similar manner. These arguments avoid the critical question of whether existing distributions of pre-tax income would be just if left undisturbed. Missing is a systematic, compelling demonstration of the role assigned to the income tax by

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ITS OF ONE FORM OF RULE UTILITARIANISM 39-42 (University of Colorado Series in Philosophy No. 3, 1967).

<sup>43</sup> See 2 J. MILL, *supra* note 7, at 396:

For what reason ought equality to be the rule in matters of taxation? As a government ought to make no distinction of persons or classes in the strength of their claims on it, whatever sacrifices it requires from them should be made to bear as nearly as possible with the same pressure upon all.

<sup>44</sup> *Id.* at 407-08.

<sup>45</sup> See 1 J. MILL, *supra* note 7, at 260-61, for Mill's description of the conditions of society that must be changed. See also 2 J. MILL, *supra* note 7, at 411-14, where Mill supports differential taxation of economic rent.

society and an explanation of how these maxims help to effectuate that purpose. In short, missing is the elaboration of a theory of social justice which supports the use of these maxims.

Moreover, we have seen that while utilitarianism is an intuitively appealing theory of social justice, it has grave shortcomings. Because happiness is a subjective state, there is no convincing or reproducible way to measure it. Thus it is difficult to persuade others that utility will be maximized by a particular course of action. Moreover, utilitarianism is presented as self-evidently true. Thus the theory itself provides no method for discussing the relative merits of utilitarianism with one who finds another theory of justice—such as libertarianism—to be self-evidently true. With the problem now clearly in focus, let us turn to a consideration of the methodology and principles of social justice advanced by John Rawls.

### III. THE RAWLSIAN FRAMEWORK

*A Theory of Justice*, winner of the 1973 Coif Award as the best book written in law in the three preceding years, is the most important work of moral philosophy written in this century. No serious jurisprudential debate can avoid dealing with Rawls's theory of justice. Rawls builds on the proposition that

society is a cooperative venture for mutual advantage . . . marked by a conflict as well as an identity of interests. There is an identity of interests since social cooperation makes possible a better life for all than any would have if each were to live solely by his own efforts. There is a conflict of interests since persons are not indifferent as to how the greater benefits produced by their collaboration are distributed, for in order to pursue their ends they each prefer a larger to a lesser share. A set of principles is required for choosing among the various social arrangements which determine this division of advantages and for underwriting an agreement on the proper distributive shares. These principles are the principles of social justice: they provide a way of assigning rights and duties in the basic institutions of society and they define the appropriate distribution of the benefits and burdens of social



cooperation.<sup>46</sup>

### A. *Reflective Equilibrium and Arguments About Justice*

Before examining Rawls's principles of social justice, one must obtain a basic understanding of the nature and purpose of moral argument. Moral theories cannot be deduced from principles which themselves are self-evidently true. We need not, however, be content with *ad hoc* moral judgments. Moral theories can be tested, and in a sense proved, through the process of reflection and philosophical argument.<sup>47</sup> Suppose an individual is of the opinion that only consumption should be taxed—that it is unjust to have an accretion-based income tax. Any such considered moral judgment can be thought of as derived from principles of social justice, which in turn can be thought of as inferences from a body of relevant theories, such as “a theory of the person, a theory of the role of morality in society, a body of general social theory, and so on.”<sup>48</sup> The first task of philosophical argument is to require an individual to identify and make explicit the conception of justice underlying his *ad hoc* moral judgments and to make explicit the even deeper theories which support this conception of justice.<sup>49</sup>

After the individual has in this manner identified what he really believes to be true, then the process of meaningfully debating and testing such beliefs can begin. For instance, upon seeing that the theory of the person underlying a competing theory of justice is preferable to the theory of the person which underlies his own theory of justice, an individual might choose, or indeed feel compelled, to revise his own considered judgments and underlying conception of justice in a way compatible with the preferable theory of the person. Philosophical argument and adjustments to our set of moral beliefs should continue until there is no tension between our considered moral judgments and the underlying moral structure which we have identified as supporting our moral judgments, and until there is no tension between this underlying moral structure and alternative moral structures of which we are aware. At this

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<sup>46</sup> J. RAWLS, *supra* note 6, at 4.

<sup>47</sup> *Id.* at 22. But see R. DWORKIN, *supra* note 35, at 158.

<sup>48</sup> Daniels, *On Some Methods of Ethics and Linguistics*, 37 PHILOSOPHICAL STUD. 21, 25 (1980).

<sup>49</sup> *Id.* at 27.

point we have reached a state of reflective equilibrium, and the principles of social justice which we hold are the correct ones for us at that moment in time.<sup>50</sup>

It is possible that fully rational men, that is, persons who have expunged all irrational desires through cognitive psychotherapy, would arrive at the same conclusions as to the correct principles of social justice after engaging in sufficient philosophical argument.<sup>51</sup> This would be the case, for instance, if fully rational persons are by nature identically benevolent and if all relevant information about the nature of man and society were made available to them in their deliberations.<sup>52</sup> Our world is, of course, light years away from having a rational, deconditioned, fully educated populace. Further, it is unclear whether benevolence is an underlying characteristic of all fully rational, deprogrammed persons.<sup>53</sup>

This does not, however, undercut the critical importance of philosophical argument for our imperfect world. If your and my considered moral judgments—for instance, as to whether the income tax should be imposed on an accretion base or a consumption base—do not at first coincide, perhaps after we have exposed our original judgments to the mutual reconsideration required in the process of reaching reflective equilibrium, we will modify our judgments so that they do coincide.<sup>54</sup> If agreement is not thereby obtained, at least we can identify the deep underlying moral notions about which we do not agree. Perhaps it will be easier for others—legislators, for instance—to choose between these competing deeper moral structures than to choose directly between our otherwise apparently *ad hoc* moral judgments.

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<sup>50</sup> J. RAWLS, *supra* note 6, at 48.

<sup>51</sup> R. BRANDT, *A THEORY OF THE GOOD AND THE RIGHT* 113 (1979). Brandt maintains that a person's desires or beliefs are "'rational' if [they] would survive or be produced by careful 'cognitive psychotherapy' for that person." A desire is "'irrational' if it cannot survive compatibly with clear and repeated judgements about established facts." Cognitive psychotherapy is the voluntary "process of confronting desires with relevant information, by repeatedly representing it, in an ideally vivid way, and at an appropriate time."

<sup>52</sup> *Id.* at 215-17.

<sup>53</sup> *Id.* at 217. For a discussion of the modern view that there is no universal human nature, see R. UNGER, *LAW IN MODERN SOCIETY* 4-6, 40-43 (1976).

<sup>54</sup> Daniels, *Wide Reflective Equilibrium and Theory Acceptance in Ethics*, 76 J. PHILOSOPHY 256, 261-62 (1979).

### B. *The Original Position*

Rawls proposes that we begin our search for principles of social justice by considering a hypothetical original position where representative men gather to agree upon the principles of justice which will thereafter, for all of time, govern society.<sup>55</sup> Our task is to design this original position, the representatives gathered there, and the nature of their deliberations in such a way that we will all be willing to agree, in advance, that the principles of justice resulting from this hypothetical convention must be "true" principles of justice.<sup>56</sup> In other words, if we can agree on an original position which accords with our considered judgment as to the proper circumstances in which decisions about justice should be made, and which reflects our theory of the person, of procedural justice, and of the role of morality in society, then whatever principles of justice would be chosen in this original position should be the principles with which we choose to conform our considered moral judgments in order to reach reflective equilibrium.<sup>57</sup>

Most theories of procedural justice require impartiality—require that the judge divorce himself from all facts that might wrongly influence his decision. The original position is a procedure whereby we can determine, or at least meaningfully argue about, the principles of justice that impartial persons would choose. Moreover, the structure of the original position reflects the independent theory that impartiality is a requirement of procedural justice.<sup>58</sup>

In order to insure impartiality in the original position, those present must operate behind a veil of ignorance. They have no knowledge of their own abilities or of their actual place in society. They know the basic theories of human psychology, economics, and social structure, but they do not know their own particular views or psychological eccentricities.<sup>59</sup> In short, those present in the original position know nothing about themselves which would cause them

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<sup>55</sup> J. RAWLS, *supra* note 6, at 21, 135.

<sup>56</sup> We are of course not interested in logically empty truth. Rather, as stated in H. MARCUSE, *supra* note 14, at 235, we aim at the truth which is obtained by principles of justice that prove useful in achieving "the satisfaction of man's material needs, the rational organization of the realm of necessity."

<sup>57</sup> J. RAWLS, *supra* note 6, at 120.

<sup>58</sup> *Id.* at 187.

<sup>59</sup> *Id.* at 142.

to be biased in the selection of principles of justice.<sup>60</sup>

Those present in the original position are deemed to be interested in furthering their own life plans.<sup>61</sup> Each wants more instead of less of the primary social goods—"rights and liberties, opportunities and powers, income and wealth"—because having more of these goods will increase the chances of fulfilling their life plans.<sup>62</sup> While the representative men are not interested in the life plans of others *per se*, they understand that mutual cooperation makes possible a better life than if each lived separately by his own efforts. They are, therefore, desirous of reaching an agreement on fair terms of social cooperation.<sup>63</sup>

The deliberators in the original position are to choose permanent principles of justice for society.<sup>64</sup> The deliberators are keenly aware that they must be prepared to live with these principles, and with the assignment of rights and duties and the division of the societal pie which they require, no matter what position in society they should find themselves to actually occupy. Collateral to this is the realization that the principles of justice chosen must result in a stable society and must therefore be designed to draw forth the willing cooperation of every member of society, no matter what his lot.<sup>65</sup>

The original position is thus designed so that the representative men present are morally equal individuals. The life plan of each deliberator is important in and of itself, and thus no representative is willing to agree to principles which would allow men to be used, and their life plans sacrificed, as a mere means toward someone else's end.<sup>66</sup> Each deliberator is desirous of obtaining the benefits of societal cooperation, and because of the veil of ignorance the terms agreed to will be arrived at impartially.

### C. *The Principles of Social Justice*

The derivation of principles of social justice follows naturally from the original position. Because the deliberators are morally

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<sup>60</sup> *Id.* at 19.

<sup>61</sup> *Id.* at 127.

<sup>62</sup> *Id.* at 92.

<sup>63</sup> *Id.* at 126.

<sup>64</sup> *Id.* at 135.

<sup>65</sup> *Id.* at 178.

<sup>66</sup> *Id.* at 179-81.

equal, and because they do not know what position they hold in existing society or what their personal talents and psychological eccentricities are, they will initially agree that all liberty and all advantages wrung from social cooperation should be divided and distributed equally. Knowing that they will be forced to live with their lot in actual society, the parties will be unwilling to agree that some should have more than others. Even if a participant might wish that he could be rich, he cannot afford to gamble that he might end up as the poorest of the poor.<sup>67</sup>

However, the possibility exists under general theories of psychology and economics, which theories would be known to the participants, that a larger societal pie, a larger sum of primary social goods, could be achieved if some members of society were allowed to have more primary social goods than others. If incentives were provided for extra work or difficult work, more of such work might be done, making everyone better off in the process. Some deliberators would object that no proof exists that man in fact is so base as to require a greater share of society's goods before he will do his share of socially necessary tasks. All would be forced to agree, however, that given existing theories of human psychology the possibility cannot be ruled out that incentives, and thus inequalities, might prove to be socially necessary. The initial decision in favor of equality was based on the parties' interest in having the best possible life prospects whatever their actual lot in life should turn out to be. If allowing inequalities would result in better life prospects for those drawing the worst hand, the deliberators in the original position would want such inequalities to be allowed.<sup>68</sup> The deliberators would eventually agree, therefore, to a governing principle of social justice calculated to safeguard their life prospects. "All social primary goods—liberty and opportunity, income and wealth, and the bases of self-respect—are to be distributed equally unless an unequal distribution of any or all of these goods is to the advantage of the least favored."<sup>69</sup> Rawls terms this general rule the

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<sup>67</sup> *Id.* at 150-51.

<sup>68</sup> *Id.* at 151-61.

<sup>69</sup> *Id.* at 303. This is Rawls's general statement of the principle of social justice. In ideal theory Rawls defines the difference principle more narrowly: "Social and economic inequalities are to be arranged so that they are . . . to the greatest benefit of the least advantaged." In this special conception the difference principle is constrained by two higher principles: (a) Positions must be fairly open to all; (b) Each person shall have equal basic liberties. *Id.*

difference principle. Any difference in wealth, income, power, or opportunity—that is, any inequality—is just only if allowing the difference maximizes the life prospects of the least advantaged.<sup>70</sup>

#### *D. The Purpose of the Income Tax*

In a society structured in accordance with the difference principle the purpose of taxation is both “to preserve an approximate justice in distributive shares” and “to raise the revenues that justice requires.”<sup>71</sup> Income is a primary social good, representing a person’s distributive share of society’s current product. A person’s income is just only to the extent it satisfies the difference principle. If the before-tax distributive shares of income do not satisfy the difference principle, then an income tax is the mechanism used by society to make the after-tax shares of income just. The rate of income tax must be calculated to produce the maximum revenues for transfer to the least advantaged, taking into account any disincentive effects.<sup>72</sup> The income tax extracted from an individual’s gross income represents a sum of money to which the taxpayer is not morally entitled, and to which others, the least advantaged, do have a moral claim. The sum remaining after the payment of income tax, assuming the income tax has been levied at rates and in a manner required by the difference principle, is a sum to which the taxpayer may claim moral entitlement.

Many of us, either instinctively or after philosophical argument, will find that our considered moral judgments are in reflective equilibrium and include the difference principle and the belief that the purpose of the income tax is to extract from a taxpayer the portion of pre-tax income to which he is not morally entitled. Further, for many of the individuals holding these moral views, the present pre-tax, pre-transfer payment, distribution of income would be viewed as violative of the difference principle, and, therefore, unjust. Accordingly an accretion-based income tax would be viewed as required by justice.<sup>73</sup>

In a totally just society, however, even those who believe in the

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at 302.

<sup>70</sup> *Id.* at 75-80.

<sup>71</sup> *Id.* at 277, 278.

<sup>72</sup> *Id.* at 277-79.

<sup>73</sup> See pp. 3-4 *supra*.

difference principle might prefer a consumption-type income tax. In such a utopia, the background conditions for a just society would be satisfied. All positions would be fairly open to all. Each citizen would receive adequate prenatal care (including correction of genetic defects), adequate early childhood care and experiences, and educational opportunities appropriate to their needs and talents. Moreover, the monetary rewards available for a given unit of work would presumably be the same, except perhaps for overtime or hazardous duty pay. Transfer payments would undoubtedly still be required for the victims of misfortune, and governmental revenues would of course be needed for public goods. However, in such a utopia, the income tax would merely be a revenue raising device, because gross income would be deserved and justly held.

In such a utopia, taxes would be levied proportionately, either on a lump-sum basis or in proportion to some appropriate, horizontally equitable standard. The range of just definitions of income would not be limited to an accretion concept. A consideration of subordinate arguments of efficiency, equity, and practicability would then be appropriate.<sup>74</sup> Perhaps, as Rawls suggests, the choice made in such a just society would be a consumption-type income tax.<sup>75</sup>

#### IV. MEANINGFUL DISCUSSION OF QUESTIONS OF JUSTICE

##### A. *Libertarianism*

Diametrically opposed to the difference principle is libertarianism—the theory of natural liberty. In a society structured in accordance with the principles of natural liberty each person is considered morally entitled to his natural talents and abilities and to whatever reward he is able to obtain through free exchange with others. Whatever distribution of income or other primary social goods results from a system of free exchange is necessarily just and the needs of the least advantaged are left to charity.<sup>76</sup> For some libertarians the justness of these personal entitlements is self-evi-

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<sup>74</sup> *Id.*

<sup>75</sup> See J. RAWLS, *supra* note 6, at 278-80. The key point to realize is that Rawls advocates a consumption-type tax only for a society in which pre-tax income is justly distributed.

<sup>76</sup> R. NOZICK, *ANARCHY, STATE, AND UTOPIA* 265-68 (1974); Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103, 135 (1979).

dent, and not derived from higher principles of justice.<sup>77</sup> Others justify a system of natural liberty by asserting that in the long run everyone will be better off under a system of natural liberty.<sup>78</sup>

Under a libertarian theory of justice, the pre-tax distribution of income is just if it is the product of a formally free market. Thus, even if a particular distribution of income is the result of business monopoly or other types of unequal bargaining relationships, the libertarian will believe that the distribution of income is just and should not be disturbed.<sup>79</sup> Necessarily, then, a libertarian will believe that the choice of a proper base for the income tax is not limited and that the governing maxim for designing the income tax is the requirement that the just pre-tax distribution of income not be disturbed by the tax imposed.

It can thus be seen that the central dispute between proponents of the difference principle and proponents of libertarianism concerns the conditions under which one can claim moral entitlement to his or her distributive share of income. Advocates of the difference principle believe that an unequal distribution of any primary social good is unjust unless allowing such inequality is to the benefit of the least advantaged. Necessarily, an advocate of the difference principle believes that one does not deserve those personal attributes which enable one to earn a greater amount of money than others. Instead these assets are the result of factors which are morally arbitrary. Conversely, a libertarian believes that individuals are entitled to their natural assets.

### *B. Argument at the Ad Hoc Level*

At the level of our *ad hoc* moral judgments we do feel some moral entitlement to our income.<sup>80</sup> However, on reflection we may be unwilling to say that our income is a measure of our moral worth. Consider the declining income of an athlete as his natural talents erode with age. Surely his moral worth does not diminish

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<sup>77</sup> R. NOZICK, *supra* note 76, at 10-12, 89-90.

<sup>78</sup> For instance, POSNER, *supra* note 76, at 132:

[L]awfully obtained wealth is created only by doing things for other people—offering them advantageous trades. The individual may be completely selfish but he cannot, in a well-regulated market economy, promote his self-interest without benefiting others as well as himself.

<sup>79</sup> See KENNEDY, *supra* note 28, at 1735-36.

<sup>80</sup> J. RAWLS, *supra* note 6, at 311.



apace. On further reflection we realize that the athlete's natural talents were the result of genetic and environmental factors over which he had no control. Moreover, his income is dependent on a scheme of social cooperation that safeguards his personal liberty and establishes his rights to hold property. As our good looks, talent, age, health, and positions are so greatly influenced by the luck of the draw, by morally arbitrary contingencies, how can we claim that any sum which we can extort for our services or the use of our property is a sum to which we are justly entitled?

The libertarian will quickly respond that we have missed the point. The claim is not that we are entitled to our income because we deserve our natural talents. Rather we are entitled to our income because we exercise our talents in a relationship of voluntary exchange with others. It is the productive act and its product to which we are entitled.<sup>81</sup>

The first step in this argument rests on the moral notion of autonomy. No one may justly perform a lobotomy on Albert Einstein to neutralize his greater intelligence. Nor may we force him to exercise his talent in our behalf.<sup>82</sup> If we induce Einstein to voluntarily exercise his talents in our behalf, is he not entitled to the agreed reward?<sup>83</sup>

This, indeed, is an appealing argument; for none of us wish to be forced to work, or to be lobotomized. Nor do we wish to have someone welch on a voluntarily arrived-at bargain. Moreover, most of us believe that the effort expended in productive activity, or the mere fact of being productive, must result in moral entitlement to the reward received.<sup>84</sup> However, while we can all agree that a person is entitled to retain his natural assets and to determine whether or not to use them, the second step—that he is entitled to the entire agreed reward—does not follow from the first.

It must be remembered that society is a cooperative venture. The regime of rights and duties and the willing cooperation of society's members make possible a much larger societal pie than could be achieved in a state of nature. A person agrees to perform ser-

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<sup>81</sup> R. Nozick, *supra* note 76, at 225.

<sup>82</sup> *Id.* at 229.

<sup>83</sup> *Id.* at 224-27.

<sup>84</sup> This notion is elevated by Posner to the point where a person's morality is a function of his "capacity to produce for others." Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 *HOFSTRA L. REV.* 487, 499 (1980).

vices in the context of the existing regime of rights and duties. Accordingly, a person is entitled to receive and retain for his services that which he could legitimately have expected to receive and retain when he performed the services, based on the just social arrangement then in existence.<sup>85</sup>

What a person can legitimately expect to receive for his services is dependent on whether the pre-tax distribution of income is just. If it is not, and if the society is justly designed, an accretion-based income tax will be a part of the existing social arrangement. A person entering into an income-producing activity in such a society would expect to receive only a net reward—the gross amount paid for such services, less the income tax extracted.<sup>86</sup> Indeed, for most individuals in our society, the withholding system insures that a net reward is all that ever passes into a taxpayer's hands. If the existing income tax is just, then this net reward is just.

The *ad hoc* argument which we have traced has come full circle. Some light has been shed on the dispute between advocates of libertarianism and advocates of the difference principle (or similar liberal theories of justice). Nonetheless, the deeper theories underlying these diametrically opposed theories have not been exposed to meaningful debate, and without such debate we cannot hope to determine true principles of social justice or convince others of such truth. Let us now consider the possibility of utilizing the Rawlsian framework for comparative philosophical analysis.<sup>87</sup>

### C. Required Visitation of the Original Position

Rawls's theory of social justice gives us a standard against which to measure the justness of the pre-tax distribution—a standard that many of us will find intuitively appealing. More importantly, Rawls has laid bare the entire supporting framework of his theory and given us the key so that we may enter the original position ourselves. Accordingly, the original position can help us reach a state of reflective equilibrium and gives us a means of explaining to

<sup>85</sup> J. RAWLS, *supra* note 6, at 311.

<sup>86</sup> The present system allows the extraction of FICA taxes and various state income taxes. Presumably these taxes should be incorporated within the federal income tax in an imperfect society structured in accordance with the difference principle.

<sup>87</sup> For an argument that the Rawlsian framework can lead to "correct" moral theories, see Fried, *The Laws of Change: The Cunning of Reason in Moral and Legal History*, 9 J. LEGAL STUD. 335, 341-45 (1979).

others how we reached that state.

The design of the original position reflects "a theory of the person, a theory of procedural justice, general social theory, and a theory of the role of morality in society (including the ideal of a well-ordered society)."<sup>88</sup> From the original position representing these background conditions a set of moral principles can be derived, including a theory of social justice. The theory of social justice derived can then be tested for compatibility with our *ad hoc* moral judgments, and the adjustments necessary to reach reflective equilibrium can be made.<sup>89</sup>

The crucial justificatory force of the original position device lies in the independence of our *ad hoc* moral judgments and the deeper theories underlying the design of the original position.<sup>90</sup> Thus the process of reaching reflective equilibrium is not merely a circular process whereby our *ad hoc* moral judgments are plugged into the design of the original position and then regurgitated back out in the form of moral principles consistent with our preexisting *ad hoc* moral judgments. Instead, the original position reflects independent, deeper theories with no connection to our *ad hoc* moral judgments other than the connection which we produce by the process of reflection. Moreover, the original position allows us to draw on our deeper theories of the person, procedural justice, general social theory, and the role of morality in society, even if it would be impossible for us to otherwise fully and coherently describe what these theories are. This is so because these theories are necessarily reflected in the design of the original position.

The utility of the original position as a replicable framework for comparative philosophical argument is therefore evident.<sup>91</sup> Those with differing theories of social justice can mutually test their theories by designing an original position within which their theories could be logically derived. Arguing about the design of and deliberation within the original position allows conflicts at the level of *ad hoc* moral judgments to be temporarily laid aside and provides a means of indirectly, and thus less confrontationally, determining if

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<sup>88</sup> Daniels, *supra* note 54, at 260.

<sup>89</sup> *Id.* at 258-61.

<sup>90</sup> *Id.* at 259-60.

<sup>91</sup> For Rawls's description of the utility of the original position as a device for comparative philosophical argument, see J. RAWLS, *supra* note 6, at 121-22.

the underlying moral structures are also at loggerheads. If one finds that a theory of justice which he holds could not be derived from an original position designed in a manner which appeals to his sense of justice, then presumably he will adjust his theory of justice accordingly.

Let us suppose that my considered moral judgments are in conflict with the difference principle. I dearly hold to the belief that I am morally entitled to every last penny of the \$500,000 in pre-tax income which I receive annually, and that the income taxes I pay are immorally extracted from me.<sup>92</sup> I have listened to the *ad hoc* moral arguments made by proponents of the difference principle, and I remain unconvinced. At the *ad hoc* level I reject the difference principle and continue to embrace libertarianism. Moreover, I have listened carefully to your description of how the difference principle is derivable from the Rawlsian original position. You have now asked me to explain where you have gone wrong in your analysis—to point out what is incorrect about the original position you have designed. You have also invited me to enter the original position and explain how my libertarian principles are derived. Must I attempt to find mistakes in your reasoning or in the design of your original position? Must I enter the original position and attempt to develop a coherent theory of justice which supports my *ad hoc* moral views? What if I refuse?

It is my considered moral judgment that one who asserts the correctness of a particular moral code or moral judgment must either expose and explain the entirety of the moral structure which supports his assertions or forfeit any claim to our attention or consideration.<sup>93</sup> Any particular distribution of income is enforced by the power of the state, but is just only if that power has been justly exercised. Those who benefit from existing society occupy a position of power in relation to others by virtue of this governmental mechanism.<sup>94</sup> Thus, while "citizens need not talk about many things, they *must* respond when somebody challenges the legitimacy of their power position."<sup>95</sup> This is so because "it is only the failure to answer the question of legitimacy that conclusively es-

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<sup>92</sup>See J. HOSPERS, *LIBERTARIANISM* 207-10 (1971).

<sup>93</sup>See B. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 371-74 (1980).

<sup>94</sup>*Id.* at 4-5, 89.

<sup>95</sup>*Id.* at 372-73.

tablishes the illegitimacy of an exercise of power."<sup>96</sup>

This obligation to meaningfully discuss and debate issues of public policy is also a practical necessity. Lawyers, trained in the Socratic method, have an almost instinctive aversion to dogma. Suppose Professor Andrews, when asked to explain in detail the philosophical structure which supports his considered moral belief in the preeminent justness of a consumption-type income tax, should refuse, declaring that his considered moral judgments are self-evidently correct and that discussion is therefore unnecessary.<sup>97</sup> I submit that in the eyes of most of us his arguments in favor of a consumption-type income tax would thereafter be given substantially less credence.

The next question, of course, is whether persons who recognize the moral and practical obligation to engage in meaningful debate, and thus to answer meaningful questions, would feel constrained to enter the original position if asked to do so. If asked what design of the original position justifies one's theory of justice, would most of us agree that this is a meaningful question that must be answered? If the answer is yes, then the original position represents a promising tool for extending the field of meaningful debate beyond the deadlock between competing *ad hoc* moral judgments.<sup>98</sup>

There is no clear answer to this question. It is my considered judgment that the answer is yes. However, those who are afraid to expose their theories or moral judgments to the possible adverse consequences resulting from entering the original position will vigorously disparage the validity or utility of the original position as a device for meaningful philosophical argument.<sup>99</sup> The only response to these attacks is education and perseverance. Those who challenge the utility of the original position, or of philosophical argument generally, must be challenged at every turn.<sup>100</sup> Conceivably,

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<sup>96</sup> *Id.* at 373.

<sup>97</sup> I do not intend to imply that Professor Andrews would refuse to respond. Having been challenged by Professor Warren's assertion of *ad hoc* maxims of justice, see Warren, *supra* note 1, he responded in kind. See Andrews, *supra* note 13, at 949-50.

<sup>98</sup> See pp. 11-12, 15-16 *supra*.

<sup>99</sup> See, e.g., B. ACKERMAN, *supra* note 93, at 339-40; R. BRANDT, *supra*, note 51, at 234-45; Posner, *supra* note 84, at 498-99.

<sup>100</sup> The examples of confused attacks on the meaning, purpose, and value of the original position are many. In order to elevate the original position to a point of acceptability where none can refuse to enter its doors, these attacks must be carefully refuted. Dworkin, for example, believes that entering the original position adds nothing to the argument for a

as familiarity with the original position device grows, it will become impossible to refuse a request that one enter the original position, because failure to do so will be generally viewed as an unwillingness to engage in meaningful debate. If this state of affairs is to occur, it will be the result of the positive gains in meaningful discussion which use of the original position can be shown to produce. Let us now turn to a brief description of how the original position must be designed in order to produce a libertarian theory of justice. It is hoped that this sketch will constitute a provocative indication of the utility of the original position device.

#### *D. Libertarianism and the Original Position*

In the original position chosen by Rawls, the deliberators are rational, mutually disinterested, reasonably risk-averse individuals, interested in furthering their own life plans, who have come together behind a veil of ignorance to choose, unanimously and once and for all, the principles of social justice. They know that their society is characterized by conditions of moderate scarcity. Thus conflicts will arise as to the allocation of resources and positions. The principles of social justice must be drawn so as to elicit the willing cooperation of all members of society even if the allocation of primary social goods that they receive is less than they would desire. Otherwise the society will be inherently unstable.<sup>101</sup>

How must the design of the original position and the deliberators therein be changed in order to produce agreement on the

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particular principle that could not be accomplished by asserting that the proposed solution was "obviously fair and sensible." This is so, says Dworkin, because we will not find instructive what a person would have agreed to in advance in a hypothetical situation. R. DWORKIN, *supra* note 35, at 151, 152. However, the example used by Dworkin to prove this point is totally misleading:

Suppose I did not know the value of my painting on Monday; if you had offered me \$100 for it then I would have accepted. On Tuesday I discovered it was valuable. You cannot argue that it would be fair for the courts to make me sell it to you for \$100 on Wednesday. It may be my good fortune that you did not ask me on Monday, but that does not justify coercion against me later.

*Id.* at 152. Most of us will agree with Dworkin's analysis. However, it has nothing to do with the original position. The example presupposes private property rights, the right to freely dispose of property, and just entitlement of the individual to the painting. In short, the example presupposes an existing just institutional framework, and it is only for the purposes of testing the justness of the distributive mechanism of society and the theories of social justice on which they are based, that the original position is intended.

<sup>101</sup> See text accompanying notes 55-66 *supra*.

principles of natural liberty? Let us look first at the characteristics of the original position.

The Rawlsian formulation of self-interested individuals concerned primarily with furthering their own ends and having at their command as many primary social goods as possible does not at first seem inconsistent with a system of natural liberty—a system with only the minimal regime of property rights and police protection necessary for the operation of a free market within which each citizen may develop and exploit his natural talents. The deliberators will quickly realize, however, that they are (because of the veil of ignorance) unaware of their natural talents and of their starting places in society. Further, they are aware that a system of natural liberty coupled with conditions of moderate scarcity is certain to result in miserable times for many of the deliberators when they resume their lives in existing society.<sup>102</sup> In order for the deliberators to be willing to enter into an agreement which will subject them to such a possibility, the characteristics of the deliberators must be changed.

One possibility is to posit that the deliberators are not only interested in furthering their own life plans but also believe that one's natural talents are an accurate reflection of one's moral worth. Deliberators with these two characteristics could willingly accept the risks of a system of natural liberty because they would view the possibility of a miserable life not as a risk, but, should it occur, as their just desert. This change in the nature of the deliberators is most unconvincing for we have seen that at the level of *ad hoc* argument libertarians will acknowledge that natural talents are not deserved and do not reflect moral worth.<sup>103</sup> It is most unlikely, therefore, that a libertarian would seriously suggest this design change.

A second possibility is to posit that the deliberators are not only interested in receiving the largest possible distributive share of primary social goods but also are totally risk-indifferent. Given these two characteristics it is not implausible that the deliberators, being indifferent to the possibility of a miserable life, might select a system of natural liberty as offering the best chance of reaching their

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<sup>102</sup> The deliberators know the general facts and theories about human existence. J. RAWLS, *supra* note 6, at 142.

<sup>103</sup> See text accompanying note 81 *supra*.

goal. However, the Rawlsian deliberators were deemed to have family ties and thus to have some ties of sentiment to others.<sup>104</sup> This characteristic would cause the deliberators to be concerned with the possibility that a miserable life might befall those for whom they care. Accordingly the deliberators must be characterized as single individuals, without ties of friendship or family which might dampen their enthusiasms for a system of natural liberty.

These cold-blooded, risk-indifferent deliberators do not reflect an intuitively appealing theory of the person. Moreover, it can be doubted that there is such a thing as a totally risk-indifferent person. Even Evel Knievel took a parachute. Accordingly, if we are to derive libertarian principles of justice from a morally appealing original position, we will have to restore to the deliberators their Rawlsian characteristics and instead change other features of the original position.

Let us now, as Richard Posner advocates,<sup>105</sup> lift the veil of ignorance and allow the deliberators to know their real characteristics and situation in life. Now that the deliberators are aware of their natural talents and their existing places in society it is totally implausible that they will reach unanimous agreement on a system of natural liberty. There are miserable stations in life which some deliberators now know that they occupy and will insist upon leaving. There is nothing intuitively appealing about a system of natural liberty unless you occupy a preferred position or feel reasonably confident that you soon will. Indeed, if all existing persons were shepherded to a desert island from which they could leave only after agreeing unanimously to governing principles of social justice, it is most unlikely that Richard Posner or Milton Friedman, confronted by the starving multitudes of the world, and desirous of surviving the day, would push very loudly, or very long, for a system of natural liberty.

So while Posner prefers the consent which would be produced absent the veil of ignorance,<sup>106</sup> he is certain to be disappointed if he believes that the unanimous agreement reached would countenance a system of natural liberty. For the participants in our origi-

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<sup>104</sup> J. RAWLS, *supra* note 6, at 128-29.

<sup>105</sup> Posner, *supra* note 84, at 498-99.

<sup>106</sup> *Id.*



nal position are not bound by the preexisting distribution of rights and advantages. The agreement that would be reached by real individuals, aware of their present abilities and stations in life, would inevitably involve compromise and a redistributive mechanism which insures greater life prospects for the least advantaged.

We can now see that a key moral characteristic of the original position is the fact that, regardless of all other design changes, it requires uncoerced consent to principles of justice. Unless we are willing to say and believe that uncoerced consent is not a prerequisite to valid principles of justice, then we cannot derive libertarian principles of justice in an original position peopled by rational, reasonably risk-averse, reasonably human persons. Nor does the answer differ if the original position is the real world. Rather, the original position device makes clear that a system of natural liberty can be the product of uncoerced agreement only in the imaginations of those who hold, and cherish, privileged positions in society.

## V. CONCLUSION

It is surprising the extent to which tax policy debate presently avoids a systematic philosophical consideration of the requirements of justice. This article has demonstrated that a determination of the proper base for the income tax is open for debate only if the existing pre-tax distribution of income is just. If it is not, then justice requires the employment of an accretion-based income tax to make the after-tax distribution of income just.

Further, this article has demonstrated how philosophical argument can be meaningfully and easily conducted by using the original position device advocated by John Rawls. While it is not claimed that theories of justice can thereby be proved,<sup>107</sup> it is suggested that full elaboration of the theories of social justice which underlie a given proposal will result in greater societal consensus as to the governing principles of social justice. It is also suggested that for those who desire to enter the tax policy arena, engaging in argument not only at the technical level, but also at the deeper level of underlying moral theory, will result in coherent, widely understandable proposals, rather than esoteric recommendations which only appeal to the initiated.

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<sup>107</sup> But see Fried, *supra* note 87, at 341-45.